No. 21,016

IN THE

United States Court of Appeals

For the Ninth Circuit

AMERICAN PRESIDENT LINES, LTD.,
a corporation,
Appellant and Cross-Appellee,
vs.
E. B. WELCH,
Appellee and Cross-Appellant.

APPELLANT'S REPLY BRIEF AND CROSS-APPELLEE'S ANSWERING BRIEF

LILLICK, MCHOSE, WHEAT, ADAMS & CHARLES,
GRAYDON S. STARING,
FREDERICK W. WENTKER, JR.,
311 California Street,
San Francisco, California 94104,
Attorneys for Appellant and Cross-Appellee.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

Table of Authorities Cited

Cases

Codes

No. 21,016

IN THE

United States Court of Appeals

For the Ninth Circuit

AMERICAN PRESIDENT LINES, LTD.,
a corporation,
Appellant and Cross-Appellee,
vs.
E. B. WELCH,
Appellee and Cross-Appellant.

APPELLANT'S REPLY BRIEF AND CROSS-APPELLEE'S ANSWERING BRIEF

THE APPEAL

The Facts as Stated by Appellee

The Court below found the vessel unseaworthy because a mature Chief Engineer (the highest official Coast Guard License) carried a 42-pound 6″ square metal block alone. Finding No. 7 (R. I, 43, 44). The appeal followed because there is no testimony in the record to support the Court's finding that the carrying of a *42-pound* crosshead was improper. The plaintiff's own uncontradicted testimony was that the carrying of objects up to *80 or 90 pounds* was usual and customary (R. II, 62). It was only the weight, which he testified was about *110 to 125 pounds* (R. II, 15), which caused any problem in carrying the crosshead (R. II, 62).

Faced with the above obvious problems, Appellee, just as he did below, has resorted to the same critical factual misstatements which have already been considered and rejected by the District Court. Contrary to Appellee's statement at page 8, the crosshead was not an *"unwieldly"* object. There is no finding by the District Court that it was "unwieldly". In an attempt to introduce this same element of clumsiness into the liability aspect, plaintiff's attorney in preparing suggested Findings of Fact specifically asked the Court to find that it was "awkward" to carry the crosshead (Libelant's Proposed Finding No. 5, R. I, 55).[1] The vessel objected and the Court thereafter entered its own Findings of Fact and refused to adopt Welch's proposed finding.

As the Court below clearly held, plaintiff was hurt while carrying a 42-pound crosshead (Finding No. 7, R. I, 43, 44). The Court did *not* make a finding that plaintiff hurt his back while carrying a 100-pound piston, or a piston of any weight. Appellee, however, in his Brief, repeatedly joins the carrying of the *42-pound* object with *100-pound* objects. "Appellee * * * suffered * * * injuries * * * [while] *carrying heavy parts* * * *." (Emphasis added, pp. 1, 2). "He sustained injury *while carrying the several heavy parts* * * *." (Emphasis added, p. 2).

In addition to implying that the Court found that Mr. Welch had somehow hurt his back while carrying the pistons (which the Court did *not* find), Appellee points to his own testimony, given upon the reopening of his case

[1]See Appendix at end of this Brief for full quotation of Libelant's Proposed Finding No. 5.

under the circumstances correctly described in Appellant's Footnote No. 2, p. 8 of its Opening Brief. Welch then testified that he felt some "tightness" in his back after carrying the 100-pound pistons. As Appellant suggested in its Opening Brief (p. 8, ftn. 2), it felt that testimony was subject to question with respect to its accuracy. Libelant specifically asked the Court to find that Libelant had developed "tightness" in his back while carrying the pistons (Libelant's Proposed Finding No. 8, R. I, 55).[2] Appellant objected to that finding and the District Court also rejected Libelant's proposed finding that he had developed "tightness" in his back while carrying the pistons.

Thus, Appellee is still faced with the same problem that he faced when he first rested his case at the conclusion of the first day of trial. There was no evidence that carrying a 42-pound crosshead was improper, and it was apparent that the vessel would show the true weight of the object the next day. If there was any evidence in this record to support the critical finding, Appellee's Brief would have simply quoted that testimony and rested its attempted defense of the decree, instead of using 26 pages of its brief in an attempt to avoid the obvious.

I. EVIDENCE IN THE RECORD BELOW

A. The Findings

Nowhere does Appellant contend that anything other than the "clearly erroneous rule" is applicable. Appellee, however, attempts to interject a few "straw men".

---

[2]See Appendix at end of this Brief for full quotation of Libelant's Proposed Finding No. 8.

Likewise, Appellant makes no contention that the Court's findings are inadequate *as Findings.* Appellant has simply pointed out that there are certain undisputed facts which, when measured against the Findings, indicate that the critical Findings are not supported by the testimony.

"Proximate cause" is Appellee's next straw man (Appellee's Brief, pp. 14, 15). The District Court (Finding No. 9, R. I, 44) found that Welch's injuries were the "direct and proximate result" of what the Court considered to be unseaworthiness. Appellant has not appealed from Finding No. 9, and has great difficulty in understanding why Appellee has addressed any portion of his Brief to this supposed issue. Appellant firmly believes the Court should understand, however, that the "quotation" on page 15 of Appellee's Brief is not in fact a quotation from the *Ferguson* case, as it purports to be, but is a very material departure from the exact language of the Supreme Court in *Ferguson v. Moore-McCormack Lines, Inc.,* 352 U.S. 521, 523, 1957 A.M.C. 647.[3]

B. Appellee's Citation of "Ample Support"

The thrust of the entire appeal by Appellant is that the critical *Findings* are not supported by the *testimony,* and therefore reference to the Court's Findings is of no help.

---

[3]The actual quote is, "Under this statute [Jones Act] the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing * * *." Moreover, Appellee is confused as to the test of proximate cause. In a Jones Act case, it is as stated in *Ferguson.* But in a claim for unseaworthiness—the case sub juris—the test is the same as that used in common law negligence. See *Ammar v. American Export Lines, Inc.,* 326 F.2d

The repeated reference to the "tightness" in the back of Welch while he was carrying the 100-pound pistons (Appellee's Brief, p. 17) has previously been discussed.

Despite the extended quotations of Pak's testimony at page 18 of Appellee's Brief, the Court will note that there is no quotation from the testimony of any witness stating that carrying a *42-pound* crosshead on this or any other ship was a "two-man job". In fact, Appellee has failed to advise the Court that Pak was referring to a crosshead which he thought weighed *"about a hundred pounds"* (Pak, p. 7).

Pak testified on cross-examination that as far as he knew there was no reason why the crosshead could not be dismantled, and when dismantled, carrying each half (which he obviously thought weighed about 50 pounds) was a *one-man job* (Pak, p. 22). Therefore, Pak's testimony can only be read as meaning that the carrying of a 42-pound crosshead was strictly proper.

Appellee's quotation of the Judge's oral comments at the conclusion of the case (Appellee's Brief, pp. 19, 20) shows conclusively that the Judge substituted his personal opinion for the testimony in the case. He thought it was hard work for a man to carry a 42-pound object under these circumstances, notwithstanding the fact that there was testimony directly contrary by Welch, and notwithstanding the fact that there was no testimony supporting the Judge's personal impression. The Judge has, in effect, imported a concept akin to judicial notice, but

---

955 (2d Cir. 1964), cert. denied, 379 U.S. 824, rehearing denied, 379 U.S. 985; *Blier v. U.S. Lines*, 286 F.2d 920 (2d Cir. 1951), cert. denied, 368 U.S. 836.

in a highly specialized area where there is *no* common knowledge of mankind upon which the courts, seamen, or shipowners can rely.[4]

At pages 20 and 21 of its Brief, Appellee sets up another "straw man" concerning the effect of industry practices. Industry practices are not conclusive, and Appellant never said they were. What Appellant has argued is that industry practices as testified to and admitted by Appellee Welch personally (and uncontradicted by any other testimony) are of great weight. The Court cannot disregard that testimony and make findings based upon the Court's own impressions.

II. THE LEGAL STANDARD OF UNSEAWORTHINESS

Appellee misunderstands the thrust of Appellant's argument concerning *American President Lines, Ltd. v. Redfern,* 345 F.2d 629, 1965 A.M.C. 1723 (9th Cir.).

Appellant contends that the carrying of a 42-pound weight, easily handled, cannot be said to be a "dangerous condition" within the meaning of the *Redfern* case, where there is no testimony in the record that the carrying of such a 42-pound weight was improper. In the *Redfern* case there was ample evidence that when the sea valve was stuck, it took two men, or one man and additional ap-

---

[4]The Federal Courts in California adhere to the *Cal. Evidence Code.* Section 450 states, "Judicial notice may not be taken of any matter unless authorized or required by law." Sections 451 and 452 set forth which matters may or are required to be judicially noticed. An examination of each shows that in the case sub juris the Judge should not have used judicial notice in this area.

pliances, to open the stuck sea valve safely, i.e., if one man were assigned the task, a dangerous condition would exist.

As Appellee admits, there is a serious conflict between the Second and Ninth Circuits in the Opinions of *Waldron v. Moore-McCormack Lines, Inc.,* 356 F.2d 247 (2d Cir. 1965), and *Redfern, supra.* One might therefore expect a decision by the Supreme Court in the near future. Even if the Supreme Court were to reverse *Waldron* and adopt *Redfern,* Appellant herein contends there is no evidence of any "dangerous condition" in the Welch case, such as was required for a finding of unseaworthiness in the *Redfern* case.

Appellant has referred to the decision of the same District Court Judge in *Victory Carriers, Inc. v. Guiton* (9th Cir. No. 20,405) (Appellant's Brief, pp. 12, 13), for the very simple reason that this opinion, which is the only written opinion by the same District Court Judge on the question of unseaworthiness, clearly shows that the Court below considers unseaworthiness to be equivalent to the "accident-proof ship" which the Supreme Court said the shipowner is *not* required to provide (*Mitchell v. Trawler Racer, Inc.,* 362 U.S. 539, 1960 A.M.C. 1503).

With the benefit of hindsight, every injury could have been avoided by doing a task in a somewhat different manner. Neither shipowners nor seamen, however, should have their rights determined by a principle which allows each Judge, in each case, to individually decide what he thinks constitutes "seaworthiness" to the exclusion of the testimony presented to the Court. This "principle" is simply anarchy.

THE CROSS-APPEAL

If the Court sustains Appellant's contentions in the principal appeal, there will be no reason to consider the Cross-Appeal. However, if the unseaworthy finding is sustained, then clearly there is substantial evidence in the record to sustain the District Court's contributory negligence finding.

Cross-Appellant cannot prevail on his Cross-Appeal because he has failed to show that the finding that "libelant was guilty of contributory negligence for his failure to request additional help of his superiors to aid him in his assigned task on the afternoon of February 19, 1964" was clearly erroneous (Finding No. 20, R. I, 47). "A finding is clearly erroneous when 'although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed'." (Citations omitted). *McAllister v. United States,* 348 U.S. 19, 20, 1954 A.M.C. 1999.

As the Supreme Court has clearly held in defining the roles of the Appellate and Trial Courts: "This is not the place to reverse * * * because were we in [the lower court's] place we would find the record tilting one way rather than the other, though fair-minded judges could find it tilting either way." *N.L.R.B. v. Pittsburg Steamship Co.,* 340 U.S. 498, 503 (1950), 1951 A.M.C. 407.

Cross-Appellant once again misstates the finding of the lower court. At page 28 of his Brief he states, "In the course of carrying these parts, Appellee was injured (Finding No. 7, R. I, 43, 44)." The lower court found that the injury occurred while "carrying the crosshead"

(Finding No. 7, R. I, 43, 44) and not while carrying "parts". This repeated misstatement has already been discussed.

A. THERE IS SUBSTANTIAL EVIDENCE IN THE RECORD TO SHOW THAT SAFE ALTERNATIVES WERE AVAILABLE TO CROSS-APPELLANT.

Cross-Appellant attempts to have this Court believe the lower court was clearly erroneous in finding contributory negligence because the shipowner did not show that there was an individual who was standing idly by, waiting to assist Cross-Appellant. What Cross-Appellant has labeled "substantial evidence to the contrary" (Appellee's Brief, p. 30) is merely evidence that the members of the crew were performing their assigned tasks. The question asked of Goodheim (Appellee's Brief, p. 30) was, "Was there any *extra* help available to Mr. Welch at the time that he, as you saw, carried this crosshead from the lower flat up to the machine shop?" (emphasis added). He answered, "No, sir." Appellant need not prove that *extra* help was available at the time in question; it merely needs to show that a safe alternative was available to Welch, i.e, that he should have stopped when he learned that he would have to carry the crosshead by himself and should have requested his superiors to assign someone to help him. Clearly, there is direct as well as circumstantial evidence in the record to support the Trial Court's finding.

Pak assigned help when requested to do so (Pak, pp. 32, 34). There were a number of men working in both Engine Rooms of the vessel at the time of the accident.

Of course, they were occupied with other tasks, otherwise they would not have been in the Engine Rooms. It is not necessary to prove *which* man Pak would have reassigned to help Welch, and such testimony would have been objectionable as speculative. Indeed, Pak might have called someone else out, but he was never asked for any help by Welch.

The District Court obviously based its finding on the direct evidence that it was Pak's practice and responsibility to assign men to assist others when requested, and upon the circumstantial evidence that members of the crew were working nearby. "Direct evidence of a fact is not required. Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence." *Michalic v. Cleveland Tankers,* 364 U.S. 325, 330, 1960 A.M.C. 2251. The District Court properly took into consideration the direct evidence and the circumstantial evidence from which it could draw all reasonable inferences. The reasonable inference is obvious: Although there were no members of the crew standing idly by Welch at the time in question, Pak had the authority and would have taken any one of several crew members and assigned him to assist Welch in carrying the crosshead.

B. THE FAILURE OF THE INJURED SEAMAN TO REQUEST ADDITIONAL HELP TO AID HIM IN PART OF HIS ASSIGNED TASK WAS PROPERLY FOUND TO BE CONTRIBUTORY NEGLIGENCE.

Cross-Appellant's Brief in this section seems to be concerned with two general rules which are not challenged

in this case: (1) The question of unseaworthiness shall not be determined by deciding whether the seaman was also contributorily negligent (i.e., *Ballwanz v. Isthmian Lines, Inc.,* 319 F.2d 457, 1964 A.M.C. 1925 (4th Cir. 1963). (2) Assumption of risk is no defense in a seaman's case (i.e., *Socony Vacuum Oil Co. v. Smith,* 305 U.S. 424, 1939 A.M.C. 1).

There was no finding that plaintiff had a duty to *provide* assistance. This duty, if it exists, was the duty of the shipowner. The duty of the Cross-Appellant was to *request* assistance, and the Court so found (Finding No. 20, R. I, 47).

Cross-Appellant misstates the applicable law at page 34 of his Brief, where he attempts to have the Court believe that "even where a safe alternative is available, the courts have held that use of the defective apparatus does not constitute contributory negligence * * *", and once again attempts to interject assumption of risk into this case. The applicable principle is clear and well defined. The rule is that where an alternative safe course of conduct is available to a plaintiff, his choice of a course known to be unsafe is evidence of contributory negligence. E.g. *Nicroli v. Den Norske Afrika,* 332 F.2d 651, 1964 A.M.C. 1413 (2d Cir.); *Ballwanz v. Isthmian Lines, Inc.,* 319 F.2d 457, 1964 A.M.C. 1925 (4th Cir. 1963), cert. denied 376 U.S. 970 (1964); *Ktistakis v. United Cross Navigation Co.,* 316 F.2d 869, 1963 A.M.C. 1211 (2d Cir.).

Cross-Appellant urges that the lower court applied the wrong test in deciding whether or not plaintiff's negligent acts contributed to his injuries. The mere fact that the lower court did not state that plaintiff's negligent acts

contributed *directly* to his injuries cannot be used to show that the lower court was clearly erroneous. The Court found that plaintiff's negligent act contributed *50 per cent* to his injuries. It follows that Welch's conduct had to have been a substantial, direct cause of his injury.

C. CROSS-APPELLANT CANNOT INSULATE HIMSELF FROM CONTRIBUTORY NEGLIGENCE MERELY BECAUSE HE WAS WORKING ON A TASK ASSIGNED BY A SUPERIOR.

If Cross-Appellant's contention were correct, only a Captain could be contributorily negligent because every other seaman works under orders in a chain of command. The lower court specifically found what Cross-Appellant refuses to admit: The mere fact that he was told to do a job, does not excuse him from measuring up to the standards of the "reasonable man" while performing that task.

Hudson Waterways Corporation v. Schneider, 365 F.2d 1012, 1966 A.M.C. 2411 (9th Cir.), cited in Cross-Appellant's Brief at page 33, clearly indicates that a finding of contributory negligence is proper in a situation such as the instant one. Plaintiff should have stopped and requested assistance to carry the crosshead. This was a safe alternative which was open to him. His attempt to proceed by himself was a negligent act.

Throughout his Cross-Appeal, Cross-Appellant has attempted to intermingle contributory negligence with the doctrine of assumption of risk. *Socony-Vacuum Oil Co. v. Smith,* 305 U.S. 424, 1939 A.M.C. 1, clearly holds that proceeding to work with an obviously defective item, instead

of choosing a safe alternative, is only evidence of contributory negligence, but it *is* evidence of that fact. Accordingly, the lower court was not clearly erroneous in finding that Cross-Appellant should have proceeded under the alternative safe route available to him at the time of his injury—he should have requested assistance from his superiors instead of proceeding to carry the crosshead by himself.

CONCLUSION

For the foregoing reasons, we submit that this Court should set aside Findings 6 and 8 and Conclusion 2 and reverse the Decree below, or in the alternative this Court should affirm Finding 20.

Dated, San Francisco, California,
March 1, 1967.

Respectfully submitted,
LILLICK, MCHOSE, WHEAT, ADAMS & CHARLES,
GRAYDON S. STARING,
FREDERICK W. WENTKER, JR.,
Attorneys for Appellant
and Cross-Appellee.

Certificate of Counsel

I certify that, in connection with the preparation of this Brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing Brief is in full compliance with those rules.

Frederick W. Wentker, Jr.,
Of Attorneys for Appellant and Cross-Appellee.

(Appendix Follows)

Appendix

Appendix

Libelant's Proposed Finding No. 5:

The accident to libelant occurred in the early afternoon of February 19th, 1964, on board the respondent's vessel which was then in navigable waters at the Port of Los Angeles, California. On the previous day during the trip from San Francisco to Los Angeles, the ship's standby steam oil lube service pump located in the forward, lower Engine Room, was found to be pounding and not functioning properly and on the morning of February 19th, the libelant, on orders of his superior officer, the First Assistant Engineer, commenced to dismantle this pump and make the necessary repairs, since the ship could not safely go to sea unless this standly pump was in operating condition. These repairs necessitated the removal of the pistons and crosshead from the pump and required that these parts be carried up from the pump's location in the forward Engine Room to the ship's Machine Shop. In carrying each of these parts from the pump to the Machine Shop, it is necessary to go up one fairly steep ladder, about ten or twelve steps in the forward Engine Room, then over a coaming of six to eight inches through a watertight door, and across an auxiliary machine space about twenty-five feet; from there it is necessary to go up another short ladder about four steps and then over a six or eight coaming of another watertight door and proceed about ten more feet to reach the Machine Shop space. Each of the two pistons contained in this pump and the crosshead (a metal casting which separates the pistons in the pump) are of considerable weight and are *awkward to handle.* Each piston weighs about 100 lbs.; the crosshead alone, without its tail-piece, weighs some 42 lbs. (Emphasis added.)

Libelant's Proposed Finding No. 8:

In the early afternoon of said date, libelant proceeded to lift and carry each of the pistons from their location near the pump up to the Machine Shop where he checked them over and then he carried each piston back down from the Shop to the pump *whereupon a tightness developed in his back.* Libelant next lifted and carried the crosshead from the pump up the ladder and over the coaming of the watertight door leading toward the Machine Shop and felt a "pop" in his back. He set the crosshead down and was unable to finish the job. He immediately reported his condition to his superior officers who relieved him from further duty. Libelant sustained injuries to his back and spine in the course of lifting and carrying these pistons and the crosshead from the pump to the Machine Shop aboard the vessel unassisted on the early afternoon of February 19th, 1964. The Court does not feel that it is important or crucial to determine just at what point or at what instant in the course of transporting these parts that libelant's injuries occurred since the lifting and carrying of each piston and the crosshead was a two-man job under the circumstances. However, the preponderance of evidence showed, and the Court finds, that libelant sustained injuries to his back and spine while lifting and carrying the crosshead from the pump, up the ladder and over the coaming of the watertight door toward the Machine Shop on the early afternoon of February 19th, 1964; and further, that said crosshead was a substantially heavy piece of equipment which required the strength and agility of more than one man to transport same from the pump to the Machine Shop under the circumstances. (Emphasis added.)